

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA \* CASE NO. 1:10-CR-161-01-CAP  
\*  
v. \* **DEFENDANT’S SENTENCING**  
\* **MEMORANDUM**  
YI GUO DONG \*  
\* **DATE: 4/21/2011**  
Defendant. \* **TIME: 2:00 p.m.**  
\*  
\*  
\*  
\*

TO: SALLY QUILIAN YATES, UNITED STATES ATTORNEY; BRIAN PEARCE,  
ASSISTANT UNITED STATES ATTORNEY; AND THOMAS E. THURMOND,  
UNITED STATES PROBATION OFFICER.

Defendant, YI GUO DONG, by and through his counsel, George  
Chakmakis, Jr., files the instant sentencing memorandum for the Court’s  
consideration at sentencing.

1. **PERSON BEFORE THE COURT**

Mr. Dong respectfully requests the Court consider his history and character-  
istics, the nature and circumstances of the instant offense, and the plea agreement  
between the parties in fashioning an appropriate sentence in this case.

Mr. Dong is 42 years-old . He is the husband of co-defendant, Ri Hong Zheng. Mr. Dong has been married to Ms. Zheng since 2007 and they have a 7 year old son. Mr. Dong has two other children, ages 13 and 21, from a prior marriage.

Mr. Dong was raised in China and has a second grade education. Mr. Dong moved to the United States in 1992 and has lived in Georgia since 2002. Mr. Dong has worked at flea markets selling merchandise both imported from China and purchased from wholesalers in the United States since 2002. Most of the merchandise sold by Mr. Dong were “dollar” store type items but also included merchandise which is the subject of the charges in this matter.

Mr. Dong has no prior felony or misdemeanor convictions and has a Criminal History with ZERO criminal history points.

### 3. **ADVISORY SENTENCING GUIDELINES**

Base Offense Level [§ 2B5.3].....	8
Adjusted Offense Level [§2B5.3(b)(1)(B)], §2B1.1(b)(1)(G)].....	12
Adjustment for Acceptance of Responsibility [§ 3E1.1].....	-3
<b>Resulting Offense Level</b> .....	<b>17</b>
Criminal History Category I with <b>ZERO</b> criminal history points.	

1 Sentencing Guideline Range..... 24-30 MONTHS

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3 **4. A NON-CUSTODY SENTENCE IN THIS MATTER IS SUFFICIENT BUT**  
4 **NOT GREATER THAN NECESSARY TO SATISFY THE FACTORS SET**  
5 **FORTH IN 18 U.S.C. 3553(a)**

6 18 U.S.C. § 3553(a)'s parsimony provision mandates that sentencing courts  
7 impose the *minimum* reasonable sentence: "*The court shall impose a sentence sufficient,*  
8 *but not greater than necessary,* to comply with the purposes set forth in paragraph (2) of  
9 this subsection." 18 U.S.C. § 3553(a) (emphasis added).

10 Section 3553(a) is mandatory. See United States v. Booker,  
11 543 U.S. 220, 261 ("Section 3553(a) remains in effect, and  
12 sets forth numerous factors that guide sentencing."). Its terms  
13 are not met by reciting a number taken from a table of the  
14 Sentencing Guidelines that are now merely advisory. There  
15 is no presumption that such a number has taken into account  
16 all of the relevant circumstances that the statute states that the  
17 court "shall consider." See United States v. Zavala, 443 F.3d  
18 1165, 1170 (9th Cir. 2006) ("If a district court . . . makes the  
19 Guideline calculation the presumptive sentence, it will  
20 commit legal error by misapplying § 3553(a), which now  
21 makes the Guideline a, but only a, factor to be considered.").

22 United States v. Diaz-Argueta, 447 F.3d 1167, 1171 (9th Cir. 2006).

23 Sentencing courts must explicitly address the factors listed in § 3553(a) when  
24 imposing an appropriate sentence, rather than simply calculate the defendant's guideline  
25 range, presuming that the guideline range is a reasonable sentence. That is, beyond using  
26 the Guidelines, sentencing courts should consider factors such as the person before the  
27 court, and should give reasons behind its imposition of a certain sentence. Id. According

1 to the Supreme Court:

2 a district court should begin all sentencing proceedings by  
 3 correctly calculating the applicable Guidelines range. As a  
 4 matter of administration and to secure nationwide  
 5 consistency, the Guidelines should be the starting point and  
 6 the initial benchmark. The Guidelines are not the only  
 7 consideration, however. Accordingly, after giving both  
 8 parties an opportunity to argue for whatever sentence they  
 9 deem appropriate, the district judge should then consider all  
 10 of the § 3553(a) factors to determine whether they support the  
 11 sentence requested by a party. In so doing, he may *not*  
 12 presume that the Guidelines range is reasonable. He must  
 13 make an individualized assessment based on the facts  
 14 presented. If he decides that an outside-Guidelines sentence  
 15 is warranted, he must consider the extent of the deviation and  
 16 ensure that the justification is sufficiently compelling to  
 17 support the degree of the variance. We find it uncontroversial  
 18 that a major departure should be supported by a more signifi-  
 19 cant justification than a minor one. After settling on the ap-  
 20 propriate sentence, he must adequately explain the chosen  
 21 sentence to allow for meaningful appellate review and to  
 22 promote the perception of fair sentencing. Gall v. United  
 23 States, \_\_\_ U.S. \_\_\_, 128 S.Ct. 586, 596-97 (2007) (emphasis  
 24 added) (footnote and citations omitted).

18 Although a reviewing appellate court may, under the deferential abuse-of-  
 19 discretion standard,<sup>1/</sup> take into account the degree of variance from a guideline-range  
 20 sentence, the Supreme Court has “reject[ed] . . . an appellate rule that requires  
 21 ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range . . . [and  
 22 has] reject[ed] the use of a rigid mathematical formula that uses the percentage of a  
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25 <sup>1/</sup> “Regardless of whether the sentence imposed is inside or outside the Guidelines range, the  
 26 appellate court must review the sentence under an abuse-of-discretion standard.” *Gall*, 128 S.Ct.  
 27 at 597.

1 departure as the standard for determining the strength of the justifications required for a  
2 specific sentence.” Gall, 128 S.Ct. at 596. Moreover, the United States Supreme Court  
3 recently re-emphasized its prior holdings that district courts are *not* allowed to presume  
4 that a within-the-guidelines-range sentence is reasonable. See Nelson v. United States,  
5 129 S.Ct. 890, 892 (“Our cases do not allow a sentencing court to presume that a  
6 sentence within the applicable guideline range is reasonable.”) Unlike an appellate court,  
7 “[t]he sentencing court does not enjoy the benefit of a legal presumption that the  
8 [g]uidelines sentence should apply.” *Id.* (citing Rita v. United States, 551 U.S. 223, 351  
9 (2007)).

12 Federal judges must also demonstrate that they have considered the § 3553(a)  
13 factors in imposing a sentence. United States v. Knows His Gun, 438 F.3d 913, 918 (9th  
14 Cir. 2006).

16 Sentencing is not a science; rather, it is “a difficult art.” Diaz-Argueta, 447 F.3d at  
17 1172. Sentencing should not involve a mechanical application of the guidelines. Id. It  
18 should be a reasoned judgment from an impartial judge looking at the particular person  
19 and the circumstances of the crime that the particular person committed. Id.

21 Pursuant to § 3553(a), federal courts shall consider the nature and circumstances  
22 of the offense and the history and characteristics of the defendant. Id. The court shall  
23 also consider the need for the sentence imposed to: (a) to reflect the seriousness of the  
24 offense, promote respect for the law, and provide just punishment for the offense;  
25 (b) afford adequate deterrence to criminal conduct; (c) protect the public from further  
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1 crimes of the defendant; and (d) provide the defendant with needed educational or  
2 vocational training, medical care, or other correctional treatment in the most effective  
3 manner. Id. Finally, federal courts shall also consider: (1) the kinds of sentences  
4 available; (2) the need to avoid unwarranted sentence disparities among defendants with  
5 similar records who have been found guilty of similar conduct; and (3) the need to  
6 provide restitution to any victims of the offense. Id.

7  
8 In reality, “the Guidelines are not mandatory, and thus the ‘range of choice  
9 dictated by the facts [and circumstances] of the case’ is significantly broadened. Gall,  
10 128 S.Ct at 602. Moreover, the Guidelines are only one of the factors to consider when  
11 imposing sentence, and § 3553(a)(3) directs the [district] judge to consider sentences  
12 other than [just] imprisonment.” Id.

13  
14 In sum, the United States Supreme Court has indicated that even where a  
15 sentencing guideline recommends that prison time should apply, probation or a below-  
16 the-guideline sentence, can be a substantial sentence, which is sufficient punishment  
17 depending on the facts of the case and the individual before the court. As set forth  
18 below, looking at the factors under 18 U.S.C. § 3553(a)(1), a non-custodial sentence is  
19 appropriate.

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22 **a. Nature and Circumstances of the Offense (18 U.S.C. § 3553 (a)(1))**

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24 The nature and circumstances of the offense in the present case warrant  
25 downward departure and a non-custodial sentence. Although the importation  
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1 allegations are serious, the Government agrees that Mr. Dong is a native Chinese  
2 speaking person with only a second grade education from China. Mr. Dong makes  
3 no excuses for his conduct and has accepted responsibility in this matter including  
4 paying a significant cash forfeiture to the government in lieu of losing his home  
5 where he raises his child with his wife. The payment of this form of restitution is  
6 extraordinary and a hardship on Mr. Dong but shows defendant's sincere remorse  
7 in this matter which is a factor supporting a non-custodial sentence. See United  
8 States v. Kim, 364 F.3d 1235 (11<sup>th</sup> Cir. 2004.)

11  
12 Moreover, Guideline §2B5.3 Background Commentary states in part,  
13 "Similar to the sentences for theft and fraud offenses, the sentences for defendants  
14 convicted of intellectual property offenses should reflect the nature and magnitude  
15 of the pecuniary harm caused by their crimes." The victims in this case are only  
16 seeking \$22,911.66 to pay for the investigators who stopped their activity and are  
17 not seeking to be made whole for any lost profits or lost sales. Mr. Dong asserts  
18 that the pecuniary harm in this case may be overstated by the guideline range,  
19 which is based upon the arbitrarily determined infringement amount, rather than  
20 what the victims assert is their pecuniary harm. As such, a downward departure is  
21 appropriate.  
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25 Moreover, the determination of the value of the infringed items (counterfeit  
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1 trademarked and copyrighted merchandise) is a very subjective assessment. The  
2 MSRP of the items and the “flea market value” of the items involves the  
3 consideration of several variables. One consideration involves the quality of the  
4 infringing items and how closely they resemble the infringed item. Mr. Dong  
5 maintains that much of the merchandise he imported was of such a poor quality  
6 that any casual observer would hardly mistake much of the merchandise for the  
7 “real thing.” Another consideration is that most buyers who purchased the  
8 infringing items would hardly be fooled into thinking the items were genuine,  
9 when the items could be had for pennies on the dollar of their normal MSRP at an  
10 authorized dealer of such merchandise.  
11

12 Mr. Dong also asserts that a review of his financial status would not support  
13 the determination that he could have possibly obtained and paid for \$280,000 to  
14 \$392,000 worth of merchandise. Defendant admits he was buying and selling  
15 counterfeit merchandise (in addition to legitimate merchandise), but most of the  
16 items were of poor quality and he was making a modest profit of the sales of these  
17 items. The modest profit realized by such sales would not generate enough income  
18 to support the flea market value figures recommended by the government.  
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20 Defendant Dong submits that the merchandise seized by the government had a flea  
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1 market value of between \$70,000 and \$120,000, resulting in an 8 level increase in  
2 the advisory guideline range.

3 In addition, Mr. Dong objects to the 2 level increase for §2B5.3(b)(3) set  
4 forth in the PSR. First, the adjustment is not set forth in the negotiated plea  
5 agreement with the government. Further, Mr. Dong asserts that most of the  
6 infringing items he obtained had already been shipped into the United States. Mr.  
7 Dong was merely obtaining merchandise from other individuals. Mr. Dong did  
8 order merchandise from China, which was sent to him via shipping containers.  
9 However, many of these shipments contained legitimate merchandise. Defendant  
10 Dong does not deny he possessed the infringing items, but asserts there is  
11 insufficient evidence to show that he *imported* the merchandise listed in paragraphs  
12 22, 33, 34, and 35 of the PSR.

13 In addition, when confronted with the seizure of the numerous items from  
14 his business some of which were not counterfeit, Mr. Dong, without the  
15 representation of counsel, voluntarily agreed to allow the government to destroy  
16 the seized items which allowed the government to save significant sums in storage  
17 costs of evidence.

18 **b. History and Characteristics of the Defendant (18 U.S.C. § 3553 (a)(1))**

19 Mr. Dong's personal history and characteristics including, but not limited to,  
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1 his age, family responsibilities, employment history, lack of criminal history,  
2 finances, and/or profit in relation to the offense support consideration of a non-  
3 custodial sentence.

4  
5 Mr. Dong is 42 years old, has no prior criminal history See United States v.  
6 Ward, 814 F.Supp. 23 (E.D.Va. 1993) (departure warranted because the Guidelines  
7 failed to consider the length of time defendant refrains from commission of first  
8 crime), and complied with all of the conditions of her pretrial supervision. Mr.  
9 Dong presents no risk of recidivism, will not benefit (nor would society) from  
10 correctional training or treatment, and poses no danger in the community.

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12  
13 Mr. Dong is currently supporting two children and works at flea markets  
14 currently earning approximately \$2000.00 a month. As indicated in the PSR, Mr.  
15 Dong has little to no education, is a native Chinese speaker and even the  
16 Government admits that Mr. Dong did not have a clear understanding of the  
17 infringement laws. The PSR also indicates that Mr. Dong has been living in the  
18 United States since 1992 and has abided by the law up until the current offense  
19 including and paying all required taxes.

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23 **c. The Court Should Depart Downward Two Points For Aberrant**  
24 **Behavior**

25 Pursuant to USSG § 5K2.20, the Court may consider a downward departure  
26 for aberrant behavior if the defendant committed a single criminal occurrence that

1 (1) was committed without significant planning; (2) was of limited duration; and  
2 (3) represents a marked deviation by the defendant from an otherwise law-abiding  
3 life. Mr. Dong has a criminal history score of ZERO with no previous convictions  
4 and meets this criteria. The Court should depart downward two points for aberrant  
5 behavior.  
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7 **d. The Court Should Depart Downward based on Defendant's Assistance to**  
8 **the Government**  
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10 As indicated in the PSR, not only has Mr. Dong cooperated with the Government  
11 in facilitating the destruction of the items seized in this case but he has also provided  
12 information to assist the Government in regards to the prevention of other similar  
13 offenses. To date, the Government acknowledges such assistance but has not indicated  
14 whether it will be filing a 5K1.1 departure. Nonetheless, the Court may consider the  
15 Defendant's assistance in this regard in determining whether to depart further and order a  
16 non-custodial sentence which is within the Court's discretion and supported by the facts  
17 and circumstances of this case.  
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20 **e. Purpose of Sentencing (18 U.S.C. § 3553(a)(2))**  
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22 Factors including a person's age, education, prior criminal history and  
23 employment history are important considerations in the likelihood that an individual will  
24 commit crimes in the future. In consideration of all these factors, Ms. Dong, a 42 year  
25 old male with no prior criminal record presents no risk of recidivism.  
26

1 In addition, in light of his lack of criminal history, age, employment, parental  
2 status and job, Mr. Dong poses no danger to the community and would not benefit from  
3 incarceration training and treatment.

4 **f. Kinds of Sentence Available (18 U.S.C. § 3553(a)(3))**

5 **1. Probation**

6 Probation is a sentence sufficient, but not greater than necessary, to achieve the  
7 sentencing goals pursuant to 18 U.S.C. § 3553(a) and in light of the Sentencing  
8 Guidelines. After his arrest, Mr. Dong was released on bond subject to pretrial  
9 supervision, including electronic monitoring, which he has complied with. Mr. Dong's  
10 compliance with all pretrial conditions and orders of the Court shows his ability to  
11 comply with probation and any conditions thereon.

12 **2. Alternatives to Prison**

13 Should the Court be inclined not to grant Mr. Dong to a period of probation with  
14 conditions, Defendant respectfully requests that this Court consider alternatives to prison  
15 including, but not limited to, home detention and community confinement (Community  
16 Corrections Center of halfway house). In light of Mr. Dong's lack of prior record, age,  
17 cooperation with the Government and responsibilities as a Husband and Father, home  
18 confinement would be just as efficient as well as less costly than incarceration.

19 **3. Voluntary Surrender**

20 Should the Court sentence Mr. Dong to a period in custody, he respectfully  
21 requests that in lieu of being taken into custody immediately at sentencing, that he be  
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1 permitted to continue to remain on bond subject to pretrial supervision until being  
2 notified by the Bureau of Prisons as to his designation and report date. As set forth  
3 above, Mr. Dong has, along with voluntarily surrendering from China, complied with all  
4 Court orders and conditions of his pretrial supervision and has no prior criminal record.  
5 Accordingly, he would be the appropriate candidate for voluntary surrender if a non-  
6 custody sentence is not granted.  
7

8 **5. CONCLUSION**

9 For the foregoing reasons, Mr. Dong respectfully requests that this Court impose a  
10 probationary sentence with appropriate conditions.  
11

12  
13 Respectfully submitted,  
14 /S/ George Chakmakis  
15 GEORGE CHAKMAKIS  
16 CA State Bar No. 162634  
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23  
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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the Defendants' **DEFENDANT'S SENTENCING**  
**MEMORANDUM** was prepared and that I have caused a copy to be electronically  
mailed to the following attorney of record:

Honorable Brian Pearce  
Assistant U. S. Attorney  
75 Spring Street, Suite 600  
Atlanta, GA 30303

This the 19th day of April, 2011.

/S/ George Chakmakis  
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